Supreme Court, U.S.
FILED
MAR 22 2001
CLERK

No. 00-1180

IN THE

# Supreme Court of the United States

BEN GARRISON, as Personal Representative of the Estates of Ralph and Molly Garrison,

*Petitioner,*

*v.*

JOSEPH POLISAR, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF IN OPPOSITION FOR CITY RESPONDENTS

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## PARTIES TO THE PROCEEDING

Counsel for City Respondents represents Albuquerque Police Department ("APD") Chief Joseph Polisar, APD supervisors Lieutenant Ruben Davalos, Lieutenant Robert DeBuck, Lieutenant Judd Schaffer, Sergeant Kevin McCabe, and Acting Sergeant Steve Rodriguez, APD Officers Howard Neal Terry and Charles Lopez, and APD Dispatchers and 911 Operators Christina Baca, Mary Patrick, Mary Marquez, and Gilbert Duran. All of the individuals listed above were at all relevant times employees of the City of Albuquerque, New Mexico. Throughout this Brief in Opposition, the individuals listed above will be collectively referred to as "City Respondents."

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## STATEMENT OF THE CASE

City Respondents do not dispute Petitioner's recitation of the procedural history of this case. However, the Petitioner presented his statement of the facts in a manner which dramatizes irrelevant information and omits undisputed material facts. (Petition at 5-7.) Instead, the evidence, viewed in the light most favorable to Petitioner, reveals the following:

On December 16, 1996, at approximately 3:00 a.m., Special Weapons and Tactics ("SWAT") officers from the Albuquerque Police Department ("APD") and the Bernalillo County Sheriff's Department ("BCSO") assembled at an APD police substation for a briefing prior to executing a Search Warrant for 2615 Quincy, N.E., in Albuquerque, New Mexico. At the briefing, the APD detective who applied for the Search Warrant provided the SWAT officers with information regarding the nature of the criminal case, the suspects' substantial and sometimes violent criminal histories, and the fortifications protecting the two (2) structures located at 2615 Quincy from entry. (*See* Petition at 19a.)

The APD detective in charge of the criminal investigation knew that the landlord for 261**5** Quincy, Ralph Garrison, resided at 261**9** Quincy. Mr. Garrison's house (261**9** Quincy) is located next door to 261**5** Quincy. Having uncovered no facts upon which to conclude that Mr. Garrison was involved in the criminal conspiracy or that he posed a threat to the safety of the officers, the APD detective did not provide the SWAT officers with any information regarding Mr. Garrison. (*See* Petition at 19a.)

Shortly before the 6:00 a.m. warrant execution time, a United States Customs Service helicopter pilot informed the officers that the lights were on inside the main residence at 2615 Quincy. Arriving at 2615 Quincy first, a BCSO deputy used the BCSO Crisis Negotiation Team truck to breach the gate which led to the backyard and the rear structure at approximately 6:03 a.m. As the gate was being breached, the BCSO SWAT officers stepped out of another truck and moved into the backyard of 2615 Quincy. (*See* Petition at 20a-22a.)

Within seconds of the BCSO officers' arrival, an APD SWAT raid truck parked in front of 2615 Quincy. At approximately 6:04 a.m., the APD SWAT officers exited the raid truck. After announcing their identity and purpose for being there, the APD officers entered the main residence through an unlocked front door. The officers quickly searched the entire structure. In less than a minute, the residence and its sole occupant at the time were secured. (*See* Petition at 21a-22a.)

As the SWAT officers arrived at 2615 Quincy, an APD K-9 officer and detective drove a K-9 Unit truck through an alley to an area directly behind 2619 Quincy. The K-9 Unit truck was clearly marked as a police vehicle, with overhead emergency lights, an APD badge covering the driver's side door, and the words "CAUTION POLICE DOG" written in red four inch (4") high block letters on the side of the unit. The K-9 officer parked his K-9 Unit truck next to a combination cinder block wall and chain link fence which separates 2619 Quincy from the alley.

As the APD SWAT officers entered the main residence at approximately 6:04 a.m., the BCSO SWAT officers moved

into the backyard of 2615 Quincy. Upon entering the backyard, BCSO Deputies Eric Little and James Monteith positioned themselves in front of the combination cinder block wall and chain link fence which separates 261**5** Quincy from 261**9** Quincy. The chain link fence in front of the deputies was approximately six feet (6') high, while the approximately three foot (3') high cinder block wall varied in height and became progressively shorter as it ran from east to west. (*See* Petition at 21a-22a.)

As the BCSO officers attempted to enter the rear structure, a man, later identified as Ralph Garrison, walked out of his 261**9** Quincy home and into his backyard. Upon seeing Mr. Garrison, Deputy Little shouted, "Sheriff's Department!"; "We're executing a search warrant!"; and "Go back inside your house!" As Mr. Garrison walked toward Deputy Monteith, Mr. Garrison stated "What's going on!" and "That's my property!" As Mr. Garrison looked directly at him, Deputy Monteith shouted at Mr. Garrison, "Go back in your house!"; "Sheriff's Department!"; and "Go back in your house!" As Mr. Garrison continued walking toward Deputy Monteith, Deputy Little repeatedly yelled out to Mr. Garrison, "Sheriff's Department!"; "We're executing a search warrant!"; and "Go back inside your house!" Deputy Little also shouted out "Police Department!"; and "We're executing a search warrant!" (*See* Petition at 23a-24a.)

While standing next to a fully marked APD K-9 Unit vehicle parked in the alley adjacent to 2619 Quincy, an APD K-9 officer yelled out to Mr. Garrison two times, "Police Department!" and "Go back inside!" Twice, the detective who was also standing in the alley yelled out to Mr. Garrison, "Police Department!" and "Go back inside!" Wearing a raid jacket with approximately six inch (6") high block letters spelling

"POLICE," the detective turned around so that Mr. Garrison could see his jacket. (*See* Petition at 23a-24a.)

When Mr. Garrison was approximately seven (7) to ten (10) yards away from him, Deputy Little *yelled* at Mr. Garrison to go back inside his house. Mr. Garrison finally stopped approximately seven feet (7') away from Deputy Monteith. While Mr. Garrison was looking directly at him, Deputy Monteith ordered Mr. Garrison to go back inside his house. Mr. Garrison responded with "That's my property!" turned around, and slowly walked back inside his house. (*See* Petition at 24a.)[1]

At approximately 6:05 a.m., Mr. Garrison placed a 911 call to an APD emergency operator. APD radio dispatch did not notify either the APD or BCSO officers that Mr. Garrison had made a 911 call in which he stated that "a whole bunch of people" were breaking into his rental property. Moreover, APD dispatch did not inform the APD or BCSO officers

1. All the deputies and officers who encountered Mr. Garrison displayed their badges of office and shoulder patches. The APD K-9 Officer displayed his silver-colored cloth replica badge and a 3½ inch high by 4½ inch wide APD shoulder patch on his left arm and a 3½ inch high by 4½ inch wide K-9 Unit shoulder patch on his right side. Deputy Little and Deputy Monteith displayed their bright gold colored BCSO badges and shoulder patches. In addition to their badges and shoulder patches, Deputy Little, Deputy Monteith, and the APD K-9 Officer were dressed in standard SWAT officer uniforms and carried standard issue equipment which is used by federal, state, and local SWAT teams throughout the country. During the deputies' and officers' approximately one minute encounter with Mr. Garrison, the approximately three foot high cinder block wall separating Mr. Garrison from the deputies did not block Mr. Garrison's view of the deputies' badges and shoulder patches. (*See* Petition at 20a-21a.)

that Mr. Garrison had armed himself with a gun, and had stated that he was going to shoot the "sons of bitches." (*See* Petition at 25a-26a.)

Meanwhile, BCSO officers entered the rear structure, finding no suspects or evidence. Once the Search Warrant execution was completed, the officers began performing their administrative duties (diagraming of the location, turning the scene over to the investigating detectives, collecting equipment, etc.). After the APD officers secured the main residence, APD Officer H. Neal Terry exited the residence and searched for suspects who might be lurking/hiding in the "side yard" of 2615 Quincy. Upon clearing the "side yard" of potential threats, Officer Terry walked to the back yard to determine if the BCSO officers needed his assistance. (*See* Petition at 27a.)

When he entered the backyard at approximately 6:06 a.m., Officer Terry saw that the BCSO SWAT officers had entered the rear structure and that the detectives and deputies were now performing their evidence collection and administrative duties. Officer Terry then saw Deputy Eric Little and Deputy James Monteith standing close to the fence which separates 2615 Quincy from 2619 Quincy and directing their attention toward the rear door of 2619 Quincy. (*See* Petition at 27a-28a.)

After walking over to that area, Officer Terry asked Deputy Little about the BCSO SWAT Team's entry into the rear structure. After briefly describing the entry, Deputy Little told Officer Terry that a man, Mr. Garrison, came out of the house next door. Deputy Little then told Officer Terry that the deputies and officers repeatedly identified themselves and told Mr. Garrison to go back inside his house. Deputy

Little then made a "tongue-in-cheek" comment to Officer Terry, "Watch this guy come out with a gun now." (*See* Petition at 27a-28a.)

As Officer Terry and Deputy Little were speaking, Deputy Monteith suddenly yelled "Drop the gun!" and "Put it down." Upon hearing the word "gun," Officer Terry immediately turned his attention away from Deputy Little and looked at the rear glass storm door leading into Mr. Garrison's house. (*See* Petition at 28a.)

As he stood in the doorway, Mr. Garrison held a handgun in his right hand and a telephone in his left hand. At the doorway, Mr. Garrison had the muzzle of the gun pointed toward the ground. When he began to open the door with his left hand, Mr. Garrison extended his right arm with the pistol in it. While holding his gun at eye level, Mr. Garrison pointed the muzzle of his gun in the direction of Deputy Monteith and the other officers and deputies in the area immediately behind the deputy. (*See* Petition at 28a.)

Immediately behind Deputy Monteith, Deputy Van Eldridge was picking up his casings from the rounds he fired to breach the door lock. Acting Lieutenant Bozell was standing just a few feet away from Deputy Eldridge, while Sgt. Adam Simonson and Deputy Patrick Lucero were positioned nearby. Supervising the investigating detectives' search for evidence, Detective Lucero was just leaving the rear structure and was headed for the main residence. (*See* Petition at 27a-28a.)

As Mr. Garrison pointed the muzzle of his gun at the officers, Officer Terry feared that Mr. Garrison was going to shoot at Deputy Monteith and the other deputies and officers

behind him. To immediately end the threat of a deadly assault against his fellow officers, Officer Terry fired one round from his AR-15 rifle at Mr. Garrison. Simultaneously, Deputies Little and Monteith fired their weapons for similar reasons. (*See* Petition at 28a.)

After his first shot, Officer Terry saw Mr. Garrison still standing with his gun raised toward the officers. At that point, Officer Terry continued to fear that Mr. Garrison would fire his gun at Deputy Monteith and the other deputies and officers behind him. To immediately stop Mr. Garrison's life threatening actions, Officer Terry fired a second shot. After firing the second shot, Mr. Garrison fell from view. (*See* Petition at 28a.)

## REASONS FOR DENYING THE WRIT

The Petition failed to raise a compelling issue worthy of review by this Court. Petitioner crafted Question One in a manner which concealed the actual issue which he has asked this Court to decide. Specifically, Petitioner argued that the reasonableness test for the defense of qualified immunity and the reasonableness test for the merits of a Fourth Amendment excessive force claim have merged into a single inquiry. (Petition at 7-9.) Certainly a compelling question worthy of review, the so-called "merged inquiry" issue is currently before this Court. *See Saucier v. Katz*, __U.S. __, 121 S. Ct. 480 (2000). In this case, however, both the Tenth Circuit and the district court analyzed Petitioner's Fourth Amendment excessive force claim using the "merged inquiry" analysis urged by Petitioner. (Petition at 7a-8a & 35a.)

Reduced to its essence, Question One asked this Court to decide whether the judge or a jury should decide the "merged inquiry" for Fourth Amendment excessive force claims. With regard to this issue, the Tenth Circuit's implicit decision that a court, as opposed to only a jury, can decide the "merged inquiry" is not in conflict with the decisions of any other circuit. Although pressed by Petitioner, neither the Tenth Circuit nor the district court passed upon the issue actually raised by Petitioner in Question One.

Even if this Court decides that the review of Question One is within its jurisdiction, this case fails to raise a compelling Fourth Amendment issue worthy of review by this Court. Based on the undisputed facts which show that Mr. Garrison threatened the lives of officers and deputies with a gun, the Tenth Circuit correctly concluded that Officer Terry's use of deadly force did not violate the Fourth Amendment as a matter of law.

With regard to Question Two, Petitioner argued that the Tenth Circuit improperly "deferred" to the district court's determination of state law. With the district court having carefully researched and analyzed Petitioner's state law claims, however, the Tenth Circuit was not required to elaborate on its decision affirming the district court's dismissal of Petitioner's state law claims. For these reasons, this Court should deny Petitioner's Writ.

## I. WITH REGARD TO QUESTION ONE, THE TENTH CIRCUIT'S IMPLICIT DECISION THAT A COURT, AS OPPOSED TO ONLY A JURY, CAN DECIDE THE "MERGED INQUIRY" IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT.

Assuming that this Court will decide that the reasonableness test for qualified immunity and a Fourth Amendment excessive force claim have merged into a single inquiry, Petitioner asked this Court to decide the following issue:

> Should the Court hold that the qualified immunity and excessive force inquiries merge, this holding will inevitably and immediately raise the question centrally at issue in this case. Specifically, once the merged inquiry is recognized, whether the judge or jury should resolve this inquiry must also be addressed.

(Petition at 10.) After revealing the actual issue before this Court, Petitioner then argued that excessive force claims almost always present questions of fact which only a jury may decide. (Petition at 10-11.)

However, Rule 56 of the Federal Rules of Civil Procedure and the controlling law do not support Petitioner's argument. Under Rule 56(c), the movant in any civil case:

> bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and

> admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact.

*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (*quoting*, Fed. R. Civ. P. 56(c)). Once the movant has met its Rule 56 burden, the burden shifts to the non-moving party to establish the existence of a genuine issue for trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp*, 475 U.S. 574, 586-87 (1986). If the non-movant fails to show that there is a genuine issue as to any material fact the movant is entitled to summary judgment as a matter of law. *Celotex*, 477 U.S. at 322.

Moreover, the two (2) cases cited by Petitioner do not support his argument that a jury, not the courts, should decide excessive force questions. (Petition at p. 10) (*citing*, *Katz v. United States*, 194 F.3d 962 (9th Cir. 1999), *cert. granted sum nom.*, *Saucier v. Katz*, __ U.S. __, 121 S. Ct. 480 (2000); *McNair v. Coffey*, 234 F.3d 352 (7th Cir. 2000)). In *Katz*, the Ninth Circuit stated that " 'on summary judgment, the court may make a determination as to reasonableness when, viewing the evidence in the light most favorable to [the plaintiff], the evidence compels the conclusion that [the officer's] use of force was reasonable.' " 194 F.2d at 970 n.5 (*quoting*, *Hopkins v. Andaya*, 958 F.2d 881, 855 (9th Cir. 1992)). In *McNair*, the Court stated the following:

> Judges rather than juries resolve immunity defenses, and a judge might conclude before trial — indeed, before discovery . . . — that the circumstances would not have alerted a reasonable officer that his acts could be deemed an application of excessive force.

234 F.3d at 355 (citation omitted). Accordingly, neither *Katz* nor *McNair* support Petitioner's argument.

Reduced to its core, Question One seeks a decision regarding whether a judge or a jury should decide excessive force claims. (Petition at 10-11.) Contrary to Petitioner's argument, Question One does not present an unsettled federal issue upon which the circuits are in conflict. Indeed, the clearly established law holds that a court may decide an excessive force case if there are no disputed issues of material fact. *Celotex*, 477 U.S. at 323. For this reason, this Court should deny Petitioner's request for certiorari with regard to Question One.

## II. ALTHOUGH PRESSED BY PETITIONER, NEITHER THE TENTH CIRCUIT NOR THE DISTRICT COURT PASSED UPON THE ISSUE ACTUALLY RAISED BY PETITIONER IN QUESTION ONE.

The traditional practice of this Court precludes the grant of certiorari when "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992). "[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon. . . ." *Id.* Although Petitioner "pressed" Question One below, a review of the decisions below reveals that neither the Tenth Circuit Court of Appeals nor the district court "passed" upon Question One.

In its decision, the Tenth Circuit never passed on the issue of whether the trial court or jury should decide the question of objective reasonableness. (Petition at 1a-9a.) Simply stated, the Tenth Circuit's decision is silent with

regard to Question One. (*Id.*) Instead, the Tenth Circuit concluded that Petitioner failed to meet the burden to which all defending parties are held under Federal Rule of Civil Procedure 56:

> We agree that Officer Terry and the two other officers who fired at Ralph Garrison when he was aiming his weapon at other officers were "objectively reasonable [(sic)] in the light of surrounding facts and circumstances." Counsel argues that under *Allen*, which cited with approval *Sevier v. City of Lawrence, Kan.*, 60 F 3d 695, 699 (10th Cir. 1995), the defendants' "own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." We see no "reckless or deliberate" conduct by any of the defendants which in any way created "the need to use such force." In this regard, counsel stresses the fact that when Ralph Garrison returned to his residence after his first confrontation with the officers, one of the officers remarked that he hoped Garrison would not return with a gun. Counsel suggests that such utterance somehow proves that the officers' conduct somehow precipitated the second confrontation wherein the shooting occurred. We fail to see the connection. The central fact is that when the fatal shots were fired, Ralph Garrison was aiming his gun at other officers at the scene. Considering the circumstances, we agree that Officer Terry was acting "objectively reasonable." He did not have to wait for Garrison to fire the first shot.

(Petition at 7a-8a (footnote omitted).) Therefore, the Tenth Circuit did not pass upon Question One.

Following established Tenth Circuit law, the district court stated that "the focus of the substantive inquiry that decides the Fourth Amendment issue, whether the force is objectively reasonable, is the same inquiry that determines whether qualified immunity is available to a government actor." (Petition at 35a (citation omitted).) However, the district court never passed on the issue of whether the trial court or jury should decide the question of objective reasonableness. (Petition at 15a-60a.) Like the Tenth Circuit, the district court concluded that Petitioner failed to meet his burden under Federal Rule of Civil Procedure 56. (Petition at 37a-40a.) Therefore, the district court did not pass upon Question One.

Although somewhat obscured by Petitioner, Question One requests a decision regarding whether a judge or a jury should decide excessive force claims. (Petition at 10-11.) However, neither the Tenth Circuit nor the district court passed upon Question One. *See Williams*, 504 U.S. at 41. For this reason, this Court should deny Petitioner's request for certiorari with regard to Question One.

## III. BASED ON THE UNDISPUTED FACTS WHICH SHOW THAT MR. GARRISON THREATENED THE LIVES OF OFFICERS AND DEPUTIES WITH A GUN, THE TENTH CIRCUIT CORRECTLY CONCLUDED THAT OFFICER TERRY'S USE OF DEADLY FORCE DID NOT VIOLATE THE FOURTH AMENDMENT AS A MATTER OF LAW.

Even if this Court decides that the review of Question One is within its jurisdiction, this case fails to raise a compelling Fourth Amendment issue worthy of review by this Court. The Petitioner failed to show the existence of a

disputed issue of material fact. There being no evidence which disputes Officer Terry's assertion that he met the Fourth Amendment standard of objective reasonableness, the Tenth Circuit correctly concluded that Officer Terry's use of deadly force did not violate the Fourth Amendment as a matter of law.

In *Graham v. Connor*, 490 U.S. 386, 395 & 397 (1989), this Court created the "objective reasonableness test" which is the standard by which all Fourth Amendment excessive force (including deadly force) claims are judged. To determine the constitutionality of an officer's use of deadly force, this Court in *Graham* stated that the proper application of the "objective reasonableness test:"

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. * * * The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.

*Id.* at 396-97 (citations omitted.)

In this case, the APD and BCSO SWAT Team officers used a reasonable amount of force to execute a high risk search warrant against armed and violent suspects who resided at 2615 Quincy. The deputies and officers, moreover, took reasonable precautions to ensure that their identity and authority were known to the suspects and citizens, such as Mr. Garrison. The undisputed evidence further shows that the officers' actions preceding the shooting did not cause Mr. Garrison to come out of his house a second time and point his gun at a "whole bunch of people" who were merely standing around next door. Tragically, Mr. Garrison, without the factual or legal justification to do so, threatened the lives of officers and deputies and ultimately brought about his own death. Accordingly, the officers' and deputies' conduct preceding the shooting was reasonable and did not create the need to use deadly force against Mr. Garrison.

Although a suspect has a fundamental interest in his life, *Tennessee v. Garner*, 471 U.S. 1, 9 (1985), the Fourth Amendment authorizes a police officer to use deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others. . . ." *Id.* at 11. As long as the force actually used by an officer is reasonable, the clearly established Fourth Amendment law prohibits the consideration of less intrusive alternatives to end a deadly threat when determining the objective reasonableness of the use of deadly force.[2]

2. *See, e.g.*, *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) ("[t]he Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within the range of conduct which is objectively 'reasonable' under the Fourth Amendment"); *Scott v. Henrich*,

(Cont'd)

Moreover, "[t]he Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists." *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996), *cert. denied*, 521 U.S. 1120 (1997). Instead, a police officer may "reasonably assume his life to be in danger when confronted with a man whose finger was on the trigger of a [gun] pointed in his *general* direction." *Wilson v. Meeks*, 52 F.3d 1547, 1554 (10th Cir. 1995) (italics added).

It is undisputed that Mr. Garrison came to his rear door armed with a deadly weapon, a gun. (Petition at 6-7.) By raising his gun in the direction of Deputy Monteith and the other deputies and officers, Mr. Garrison committed the inherently violent felony of aggravated assault. *See Graham*, 490 U.S. at 396 (careful attention given to the severity of the crime). Although ordered to do so by Deputy Monteith, Mr. Garrison refused to put his gun down on the ground. *See Garner*, 471 U.S. at 11 (warning should be given if feasible). Accordingly, the undisputed evidence shows that Officer Terry could reasonably conclude that Mr. Garrison's actions created an immediate threat of serious physical harm to his fellow officers. *See id.* (deadly force proper where "the suspect threatens the officer with a weapon").

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(Cont'd)

39 F.3d 912, 915 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159 (1995) ("[r]equiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. * * * Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable"); *Plakas v. Drinski*, 19 F.3d 1143, 1149 (7th Cir.), *cert. denied*, 513 U.S. 820 (1994) ("[w]e do not believe the Fourth Amendment requires the use of the least or even a less deadly alternative so long as the use of deadly force is reasonable under *Garner v. Tennessee* (sic) and *Graham v. Connor*").

In this tense, uncertain, and rapidly evolving situation Officer Terry made a split-second decision and shot Mr. Garrison twice as he pointed his gun at Deputy Monteith and the other officers. When Mr. Garrison threatened officers with serious physical harm, the Fourth Amendment did not prohibit Officer Terry's use of deadly force to defend the lives of his fellow officers. Accordingly, Officer Terry, based on the facts and circumstances confronting him, had probable cause to believe that deadly force was necessary to stop Mr. Garrison from causing serious physical harm.

In this case, Petitioner failed to meet his burden under Federal Rule of Civil Procedure 56 to demonstrate the existence of a disputed issue of material fact. (Petition at 7a-8a & 37a-40a.) There is simply no evidence which disputes Officer Terry's well-supported assertion that he met the Fourth Amendment standard of objective reasonableness. Therefore, the Tenth Circuit correctly concluded that Officer Terry was entitled to dismissal of the Petitioner's excessive force claim as a matter of law.

## IV. WITH THE DISTRICT COURT HAVING CAREFULLY RESEARCHED AND ANALYZED PETITIONER'S STATE LAW CLAIMS, THE TENTH CIRCUIT WAS NOT REQUIRED TO ELABORATE ON ITS DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S STATE LAW CLAIMS.

With regard to Question Two, Petitioner argued that the Tenth Circuit improperly "deferred" to the district court's determination of state law. (Petition at p. 17). Petitioner further argued that the district court's opinion was not

"'exhaustive' as to many state law issues." (Petition at p. 20.) A review of the opinions below does not support Petitioner's argument.

According to the controlling case law, an appellate court's review of a district court's analysis of state law is *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991). This Court in *Salve* concluded that an "appropriately respectful application of *de novo* review should encourage a district court to explicate with care the basis for its legal conclusions." *Id.* at 233. "If [a] court of appeals [, however,] finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion." *Id.* at 232-33.

A review of the district court's Memorandum Opinion and Order in this case reveals that its disposition of Petitioner's state law claims was well-researched and analyzed. In its opinion, the district court thoroughly analyzed all of Petitioner's state law causes of action, including its negligence claim against the APD dispatchers and 911 operators, (Petition at 50a-55a,) assault and battery claims, (Petition at 55a-58a,) and false imprisonment claims (Petition at 58a.) Simply because Petitioner disagreed with the district court's dismissal of his state law claims does not mean that the district court's opinion is unsupported by the controlling state law.

With the district court having carefully researched and analyzed Petitioner's state law claims, the Tenth Circuit was not required to elaborate on its decision affirming the dismissal of the Petitioner's state law claims. *Salve Regina College*, 499 U.S. at 232-33. Contrary to Petitioner's argument, the Tenth Circuit's decision is not properly

characterized as "deference" to the district court's interpretation of state law. The Tenth Circuit's decision is more accurately read as an expressed approval of the district court's carefully researched and reasoned opinion. (Petition at 9a.) For these reasons, this Court should deny Petitioner's request for certiorari with regard to Question Two.

## CONCLUSION

For all the foregoing reasons, City Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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